IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 2878

HANS B. KNUDSEN and CAROLINE KNUDSEN, *Appellants,* **vs.** **FIRST TRUST AND SAVINGS BANK, and EMILE K. BOISOT, Trustees,** *Appellees.*	On Appeal from the United States District Court for the District of Montana.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

Statement of Case.

On June 24, 1915, the appellants commenced, in the District Court of the Fourth Judicial District of the State of Montana in and for the County of Ravelli, suit against the Bitter Root Valley Irrigation Company, hereafter referred to as the "Irrigation Company," to which appellees were made parties, setting forth certain alleged facts which it was claimed created a trust fund in

the property of the Irrigation Company and a lien upon its property prior to the lien of the mortgage of the appellees. To secure the enforcement of the lien and to complete the irrigation system it was requested that a receiver be appointed of the properties and assets of the Irrigation Company. The Irrigation Company appeared generally to said suit, the appellees appeared specially, and their special appearance was later overruled.

On January 1, 1916 (Rec., 103) the Irrigation Company defaulted on its mortgage to the appellees. On January 3, 1916, the Irrigation Company filed its voluntary petition in bankruptcy and on February 23, 1916, F. C. Webster was appointed Trustee in Bankruptcy, was duly qualified, took possession of all the property of the Irrigation Company and is now acting as such trustee. (Rec., 106.)

After the bankruptcy of the Irrigation Company the situation became desperate. (Rec., 107.) The company had planted 3,000 acres with apples and cherries which had been under cultivation for four or five years and on which the company had expended more than $300,000. The trees were just reaching bearing. Unless the trees should be taken care of and irrigated during the season the trees would die, this expenditure would be lost, and the security in which both the appellants and appellees are interested greatly and irreparably depreciated. It was part of the Irrigation Company's business to maintain an irrigation system and deliver water to settlers in the Bitter Root Valley. Failure to make this delivery would greatly and irreparably damage the property of the settlers and depreciate the value of other security of the appellees. (Rec., 108.) The immediate and continued operation and maintenance of the irrigation system of the Irrigation Company and the prompt delivery of water to settlers in the Bitter Root Valley was a mat-

ter of great public necessity. Failure of the irrigation system would bring irreparable loss and injury, not only to the property mortgaged to appellees, but to the property of many other innocent people, settlers in the Bitter Root Valley and dependent upon the irrigation system for a supply of water and the very existence of their farms and orchards. Failure to deliver this water when required would be a great disaster to Ravelli County and to the State of Montana. It then further appeared (Rec., 109) that the value of all the property subject to the lien of the mortgage of the appellees was far less than the face amount of the bonds due thereunder; that excepting certain personal property of little or no value there was no property in the hands of F. C. Webster as trustee in bankruptcy not subject to the appellee's mortgage; that F. C. Webster as such trustee therefore had no interest in putting the irrigation system in condition to deliver water or in operating or maintaining the same or in taking care of and irrigating the orchards of the Irrigation Company; that he was without funds or means of placing the irrigation system in condition to deliver water in the spring of 1916 or to maintain and operate the same; and that he was entirely without credit to borrow money for the purpose of putting the irrigation system in condition or of operating or maintaining the same or of taking care of or irrigating the orchards of the Irrigation Company. Appellees therefore obtain the consent of the Federal Court to the commencement of foreclosure proceedings and under the express power granted to the appellees in their mortgage obtained the appointment of a receiver of all of the property of the Irrigation Company. This bill was filed April 8, 1916, and F. C. Webster, Trustee in Bankruptcy, was appointed and duly qualified as the receiver of the United States District Court in the foreclosure

suit of the appellees and as such took possession of all the property of the company.

The appellees made the appellants parties to their bill of foreclosure (Rec., 106) because they claimed some interest in the mortgaged property or some part thereof. The appellants filed their answer setting up the pendency of their proceeding in the State Court and prayed (1) a stay of the foreclosure suit in the Federal Court, or (2) that the foreclosure suit proceed only with reference to the Irrigation Company and F. C. Webster, Trustee in Bankruptcy, but not with reference to any other defendants, and with the express reservation that the determination of the rights of the appellees with respect to the Irrigation Company and F. C. Webster should be subject and subordinate to any orders hereinafter made by the State Court with reference either to the appellees, the Irrigation Company, F. C. Webster as Trustee or *to the property and assets* of said Irrigation Company, and with the further reservation that the *possession* of the receiver of the Federal Court should be subordinate to any orders of the State Court with reference to the property and assets of the Irrigation Company. Motion to strike the portions of the answer referring to the proceeding in the State Court and the prayers just referred to was made by the appellees and allowed by the District Court.

The answer filed by the appellants in the foreclosure suit does *not* show (1) that a receiver was requested in the State Court for the purpose of operating and maintaining the property; (2) that any motion for the appointment of a receiver in the State Court has been made; (3) that any objection was made by the appellants to the appointment of F. C. Webster as Trustee in Bankruptcy and his taking possession of all of the property of the Irrigation Company; (4) that the proceeding in the State

Court, begun June 24, 1915, has been brought to issue up to the time of the filing of the answer in the foreclosure suit, September 4, 1916, or that any attempt is being made to prosecute the said suit in the State Court with effect; (5) that the irrigation system and the property of the Irrigation Company can be maintained and operated for the protection of the security and of the public in any way under the issues involved in the suit in the State Court; (6) that a decree of foreclosure of the appellees' mortgage can be obtained *in invitum* in the suit in the State Court (the allegations of the answer (Rec., 130-131) are merely conclusions), or (7) that the parties defendant, other than the appellants named in the foreclosure suit, have claims similar to the appellants.

BRIEF.

I.

THE PRIOR PENDENCY OF THE ACTION OF THE APPELLANTS IN THE STATE COURT IS NO BAR TO THE PROSECUTION OF THE APPELLEES' ACTION IN THE FEDERAL COURT.

Gordon v. *Gilfoil*, 99 U. S., 168.
McClellan v. *Carland*, 217 U. S., 268.
Hunt v. *New York Cotton Exchange*, 205 U. S., 322.
Land v. *Ferro Concrete Construction Co.*, 221 Fed., 433.
Brown v. *U. S.*, 233 Fed., 353.
Stanton v. *Embry*, 93 U. S., 548.

II.

WHERE THE ACTIONS ARE NOT IDENTICAL, AND WHERE THE STATE COURT IN THE PRIOR SUIT HAS NOT POSSESSION OF THE PROPERTY, THE PENDENCY OF PRIOR LITIGATION IN THE STATE COURT WILL NOT DEPRIVE THE FEDERAL COURT, IN PEACEFUL POSSESSION OF THE *res*, OF ITS JURISDICTION TO DISPOSE OF ALL MATTERS PROPERLY BEFORE IT.

Empire Trust Co. v. *Brooks*, 232 Fed., 641.
Moran v. *Sturges*, 154 U. S., 256.
Griswold v. *Central Vermont R. Co.*, 9 Fed., 797.
Edwards v. *Hill*, 59 Fed., 723.
East Tenn. R. R. Co. v. *Atlanta R. R. Co.*, 49 Fed., 608.
Compton v. *Jesup*, 68 Fed., 263.
Roger v. *J. B. Levert Co.*, 237 Fed., 737.

ARGUMENT.

The issue in the suit in the Federal Court is the foreclosure of the mortgage of the appellees involving the determination of certain claims of various individuals, including the appellants and others. Incidental to the foreclosure suit is the operation of the property and the maintenance of the security covered by the mortgage.

At the time the Federal Court appointed F. C. Webster, Trustee in Bankruptcy, and he took possession of all the property of the Irrigation Company, at the time the Federal Court appointed the same F. C. Webster receiver in the foreclosure suit of all of the property of the Irrigation Company subject to the appellees' mortgage and up until the present time the issues in the case in the State Court do not require, the appellants have not asked, and the State Court has not appointed a receiver of the *res*. The State Court has therefore neither actual nor constructive possession of the *res*.

The appellants asked for alternative relief, either (1) a stay of all proceedings in the Federal Court, or (2) that the proceedings may continue in the Federal Court but no rights of the appellants shall be affected thereby and that the State Court shall have sole control of the *res*. The question on this appeal is: Must the Federal Court surrender its jurisdiction over the *res*, even though no actual or constructive possession has been taken of the *res* in the State proceeding, no possession now asked and no possession may ever be taken, simply because a suit involving different issues but the same property was first started in the State Court?

I.

Little attention has been paid by the appellants in their brief, to the stay of all proceedings in the Federal Court. This for the obvious reason that it is settled law the pendency of a case in the State Courts is no bar to the prosecution of the same case in the Federal Courts.

In *Gordon* v. *Gilfoil,* 99 U. S., 168, an action was started in the State Courts on promissory notes and a mortgage securing the same. Judgment was rendered for the defendants because the seizure and sale by the sheriff was void. Thereupon the plaintiff started a suit in the United States court, on his notes and mortgages. The defendant claimed that plaintiff was barred because executory proceedings in the State Court were still pending. It was held that the pendency of a suit in the state court did not abate a suit upon the same cause of action in the Federal Court. Mr. Justice Bradley delivered the opinion of the court and said, page 178:

> "It may be proper here also to observe, although the point was not pressed in the argument, that the exception to the jurisdiction of the Circuit Court is destitute of foundation. The suggestion was, that, as the proceedings in the order of seizure and sale were still pending in the District Court, the debt could not be prosecuted in the Circuit Court of the United States. But it has been frequently held that the pendency of a suit in a state court is no ground even for a plea in abatement to a suit upon the same matter in a Federal Court. What effect the bringing of this suit, *via ordinaria,* may have had on the order of seizure and sale, it is not necessary to determine. It is possible that it superseded it. But the pendency of that proceeding, when the suit was commenced, can not affect the validity of the proceedings in this suit, nor the jurisdiction of the court in respect thereof."

McClellan v. *Carland,* 217 U. S., 268. A petition for mandamus was filed in the Circuit Court of Appeals for the Eighth Circuit to compel a District Judge to set aside certain orders entered in a suit staying the proceedings until the determination of a suit to be started by the State of South Dakota covering property in the hands of an administrator, which property had been in controversy in various suits in the South Dakota courts. Mandamus was denied in the Circuit Court of Appeals, and on writ of certiorari the Supreme Court reversed this finding. Mr. Justice Day, delivering the opinion of the court said on page 282:

> "The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case. In the present case, so far as the record before the Circuit Court of Appeals discloses, the Circuit Court of the United States had acquired jurisdiction, the issues were made up, and when the state intervened the Federal court practically turned the case over for determination to the state court. We think it had no authority to do this, and that the Circuit Court of Appeals, upon the record before it, should have issued the writ of mandamus to require the judge of the Circuit Court of the United States to show cause why he did not proceed to hear and determine the case."

In *Hunt* v. *New York Cotton Exchange,* 205 U. S., 322, a bill in equity was brought by plaintiff against Hunt to enjoin him from receiving and using the quotations of sales made upon the cotton exchange. An injunction had been issued against a telegraph company in the State Court restraining it from refusing to supply quotations

to defendant, and it was urged that the pendency of this suit was a bar to the suit in the Federal Court. The court held that the pendency of a suit in the State Court does not deprive a Federal Court of jurisdiction. Citing *Gordon v. Gilfoil, supra; Insurance Company v. Brunes, Assignee*, 96 U. S., 588; *Stanton et al. v. Embry*, 93 U. S., 548.

Land v. Ferro Concrete Construction Co., 221 Fed., 433. Two suits were started on the same day on the same contract in the State Court. One of these suits was removed to the Federal Court, whereupon the other State Court suit was pleaded in bar.

The court held the general rule to be that even if the causes of action set up in the two suits are identical, the pendency of a suit in the State Court does not abate an action in the Federal Court.

Brown v. U. S., 233 Fed., 353. In a criminal suit in the Federal Court, where it was sought to prevent a person from testifying on account of a conviction in the State Court the court said, page 357:

> "A similar line of cases exists asserting the independence of the federal judiciary in its jurisdiction of civil causes of action. We need not cite other than Supreme Court cases, *Stanton v. Embry*, 93 U. S., 548, 23 L. Ed., 983; *Gordon v. Gilfoil*, 99 U. S., 168, 25 L. Ed., 383, and *Hunt v. New York Cotton Exchange*, 205 U. S., 322, 27 Sup. Ct., 529, 51 L. Ed., 821, all to the point that the pendency of a prior suit in a state court is not the ground of abatement of an action on the same state of facts between the same parties in the federal court, or vice versa, the decisions turning on the principle that the two courts are foreign as the creatures of different governments. The language of these decisions leaves no room for the feeling that any interdependence exists between a state and the Federal government which affects the identification of either as a sovereignty entirely apart from the other."

Stanton v. *Embry*, 93 U. S., 548. Mr. Justice Clifford, delivering the opinion of the court, said (554):

> "It is insisted by the defendant in error that the pendency of a prior suit in another jurisdiction is not a bar to a subsequent suit in the circuit court or the court below, even though the two suits are for the same cause of action, and the court here concurs in that proposition.
>
> Repeated attempts to maintain the negative of that proposition have been made, and it must be admitted that such attempts have been successful in a few jurisdictions, but the great weight of authority is the other way."

There can be no doubt from the foregoing decisions that the appellants are not entitled to the first of the alternative reliefs prayed and there can be no stay of the proceedings in the Federal Court.

II.

We come now to the question of sole control of the *res* between the State and Federal Courts.

The suit in the State Court was started in January, 1915. In February, 1916, Webster as trustee in bankruptcy, took peaceful possession of the *res*. In April, 1916, Webster was appointed receiver and took possession of the *res* in the foreclosure suit in the Federal Court. The *res* had never been in the actual possession of the State Court, nor has the State Court ever attempted or been asked to obtain actual or constructive possession of the *res*. There is, therefore, in this case no actual or constructive possession of the *res* by the State Court, and the Federal Court is in peaceable possession of the *res*, maintaining and operating the property. The claim, however, is made that although the State Court has neither actual nor constructive possession of the *res*,

nevertheless it is essential that the Federal Court should refrain from exercising any control over the *res* because the State Court first acquired jurisdiction of the parties, and in the final disposition of the litigation there there is a possibility that it might become necessary for the State Court to exercise its jurisdiction over the *res*. In other words, has the jurisdiction of the State Court become exclusive?

The distinction between cases where as a matter of right the State Court should have exclusive jurisdiction, and where the question is one of comity and depending upon the identity of the actions, is best stated in a recent case in the Court of Appeals of the Fifth Circuit.

> "It seems clear that where the basis of the rule is an infringement of the jurisdiction of the court, and not an interference with its possession of property, the rule depends upon the existence of such a conflict and is not absolute. The quoted language of the Supreme Court indicates that the rule, where there is no disturbance of possession, is one of limited and not of universal application. It is a rule of comity, to be applied by the court asked to surrender its possession, only when it is shown that that court has interfered with the jurisdiction of the court asking the surrender. It was held to be merely a rule of comity by this court in the case of *Adams* v. *Mercantile Trust Co.*, 66 Fed., 617, 15 C. C. A., 1; a case in which there was a clear conflict of jurisdiction. Where the issues in the two suits are the same, and their subject matter substantially identical, comity and the orderly administration of justice, and the desire to avoid a conflict of jurisdiction, require of the court that last acquires jurisdiction, though it be the first to acquire possession of the property involved in the litigation, that it surrender such possession, on application, to the court of concurrent jurisdiction which first acquired jurisdiction of the controversy. This was the holding in *Palmer* v. *Texas*, 212 U. S., 118, 29 Sup. Ct., 230, 53 L. Ed., 435; *Farmers' Loan Co.* v. *Lake Street Ry. Co.*, 177 U. S.,

51, 20 Sup. Ct., 564, 44 L. Ed., 667; *Adams* v. *Mercantile Trust Co.*, 66 Fed., 617, 15 C. C. A., 1. In such cases the court making the surrender abdicates its jurisdiction over the cause, as well as surrenders possession of the *res*.

However, where the issues in the subsequent suit are different from those involved in the first suit, and the subject matter is not identical, there can be no infringment of the jurisdiction of the court in which the first suit is pending, by reason of the institution of the second suit in a court of concurrent jurisdiction."

Empire Trust Co. v. *Brooks*, 232 Fed. Rep., 641, at p. 645.

It is clear that there is no identity between the appellees' foreclosure suit in the Federal Court and the appellants' litigation in the State Court. The one is a suit for foreclosure of a mortgage, the other for the completion of the construction of the irrigation system and for the establishment of a trust fund. A successful termination in the Federal Court would involve the sale of the property as it is. A like termination of the state case would involve the new construction of the irrigation system. In one case there is sought to be enforced a mortgage lien, in the other case a resulting trust. There are parties to the foreclosure suit who are not involved in the state case. The case in the Federal Court requires the operation and maintenance of the *res*. In the State Court there is no question of operation and maintenance. Since, therefore, the appellants' suit in the State Court and the appellees' foreclosure suit are not identical, the Federal Court first obtained possession and it should be permitted to dispose of all questions.

Empire Trust Co. v. *Brooks*, *supra*, is on all fours with the present case. In that case suit had been brought in the State Courts of Texas for the appointment of a re-

ceiver and the winding up of a corporation. A subsequent suit was brought in the Federal Courts for the appointment of a receiver and the foreclosure of a mortgage. The Federal receiver was first appointed and took possession. Subsequently a receiver was appointed in the State Courts and demanded possession of the *res* in the hands of the Federal receiver. The court held that comity did not require the delivery of the *res* to the state receiver, since the two suits were not identical except so far as they related to the same property. This case goes even further than our case, for the reason that here the State Court has not appointed a receiver and no motion for such appointment has ever been made by the appellants.

A case in point is *Moran* v. *Sturges*, 154 U. S., 256. In that case a petition was filed in the State Courts for the dissolution of the corporation and for the appointment of a receiver. The receiver was appointed but had not qualified before the United States Marshal seized the *res* under a libel in admiralty. The court said (283):

> "The contention is not only that the title to these vessels vested in the receiver as of July 31, and that, in such a case as this, constructive is the equivalent of actual possession, but that although the receiver did not qualify until after the seizure by the marshal, he thereupon became constructively possessed of the vessels as of July 31, and the jurisdiction of the District Court was thereby ousted. But if jurisdiction had attached, it would not be defeated even by the withdrawal of the property for the purposes of the state court, and, moreover, the doctrine of relation has no application. As between two courts of concurrent and co-ordinate jurisdiction, having like jurisdiction over the subject matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in

dispute. But where the jurisdiction is not concurrent and the subject matter in litigation in the one is not within the cognizance of the other, while actual or even constructive possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation. That doctrine is resorted to only for the advancement of justice, and under these state statutes, is adopted to defeat fraudulent, unwarranted and unjust disposition of the debtor's property, and to accomplish just and equitable ends. *Herring* v. *N. Y. Lake Erie &c. Railroad*, 105 N. Y., 340, 377.

At the time these libels were filed and the marshal seized the property, it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, and he had neither actual nor constructive possession.

The jurisdiction of the state court over the subject matter of the winding up of the corporation and the distribution of its assets did not embrace the disposition of the claims of the libellants upon these vessels, nor were they as holders of maritime liens represented by the attorney general when he assented to the order of July 31, as mere creditors of that Schuyler Company were. The adjudication by that order may have so operated on the title in respect of the parties to that suit as to place the property constructively in the custody of the law as of that date, but not as to all persons and for all purposes. Under the circumstances we are unable to accept the conclusion that simply by the institution of the winding up proceeding, property, subject to liens over which that court could not exercise jurisdiction *in invitum*, was placed in such a situation in respect of liability to being ultimately brought within the custody of the court that the District Court could not obtain jurisdiction for the

purpose of ascertaining and enforcing those liens in respect of which its jurisdiction was exclusive. It appears to us that the District Court violated no rule of comity nor any other rule in entertaining the libels."

The Trustee in bankruptcy and the receiver of the Federal Court is in actual possession. The rights of creditors and the distribution of the bankrupt estate can only be determined in the proceeding in the Federal Court. Nor *in invitum* can the appellees be compelled to try their foreclosure suit in proceedings in the State Court, but a mortgagee has the right to select his own forum.

"It is, however, well settled that the fact that property is being administered upon in state proceedings does not prevent citizens of other states from proceeding in the Circuit Courts of the United States to establish their claims and obtain relief if entitled to it." *Griswold* v. *Central Vermont R. Co.,* 9 Fed., 797, at p. 799.

"We are not cited to any provision of the Kansas statute which purports to deny to the holder of a mortgage on real estate the right to bring suit for its foreclosure in any court of competent jurisdiction; but, if the state denied such right to its own citizens, the denial would not affect the right of a citizen of another state to bring a bill to foreclose his mortgage in the circuit court of the United States." *Edwards* v. *Hill,* 59 Fed., 723, at p. 725.

Section 6501 of the Revised Code of Montana (1907) provides

"Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated * * *

3. For the foreclosure of all liens and mortgages on real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties and the county so selected is the proper county for the trial of such action."

The case of the appellants is pending in Ravelli County, Montana. Some of the property of the Irrigation Company is located in Missoula County, and the appellees therefore, if they elected to go into a State Court at all would have the absolute right to begin their action in Missoula County. *In invitum,* therefore, the Ravelli County Court could not exercise jurisdiction over the foreclosure of the appellee's mortgage and the present case is brought squarely within *Moran* v. *Sturges, supra.*

In *East Tenn. R. R. Co.* v. *Atlanta R. R. Co.*, 49 Fed., 608, a bill had been filed in the State Court asking the appointment of a receiver. Later a similar bill was filed in the Federal Court and a receiver appointed. Immediately thereafter a receiver was appointed in the case pending in the State Court. In affirming the jurisdiction of the Federal Court, the court said (610):

> "Nor does the mere pendency of the bill in the state court in itself deny to this court the power of appointing a receiver where it has jurisdiction of the parties, and where its action is otherwise proper. Nor will such pendency affect the title of the receiver of this court. The title of a receiver, on his appointment, dates back to the time of granting the order. Beach, Rec., par. 200. In cases of conflicting appointments, the courts will inquire into the priority of appointment, and, if necessary, will take into consideration fractions of the day. Id., 232. While courts of equity have insisted upon the doctrine of *lis pendens*, they have found it difficult, and often inequitable to enforce it. Id., 200. The rule upon that subject in this state is deducible from the decision of the supreme court in *Bank* v. *Trustees*, 63 Ga., 552, where the court (Jackson, Justice, delivering the opinion) uses this language:
>
> 'But it would seem here that the stockholders' bill has been pending here for a long time in the circuit court of the United States, and no receiver is yet appointed. Perhaps none ever will be. Is the judgment creditor to wait until one is to be appointed?

He is not even in this case made a party to the bill in the United States court. If he were, and if the bill there filed was similar to this in review here, and could accomplish the same end, to wit, the collection of this debt by the judgment creditor, having the final process of the state court in his hands, even then we should rule that neither law nor equity nor comity would require the equity court to wait upon the United States court in a case like this.'

The application of that decision is that neither law, equity, nor comity will require the United States court to wait upon the state court in a case like this.

In a very carefully considered case, Mr. Justice Bradley, while presiding in this circuit, gave a controlling definition of the law. In *Wilmer* v. *Railroad Co.*, 2 Woods, 426, the learned justice used this language:

'This test, I think, is this: not which action was first commenced, nor which cause of action has priority or superiority, but which court *first acquired jurisdiction over the property.* If the Fulton county court had the power to take possession when it did so, and did not invade the possession or jurisdiction of this court, its possession will not be interfered with by this court. The parties must either go to that court, and pray for the removal of its hand, or, having procured an adjudication of their rights in this court, must wait till the action of that court has been brought to a close, and judicial possession has ceased. Service of process gives jurisdiction over the person,—seizure gives jurisdiction over the property; and, until it is seized, no matter when the suit was commenced, the court does not have jurisdiction.'

In this holding the Honorable John Erskine, the judge of this district, now retired, concurred, and in its support Justice Bradley cites many authorities, which he states have been 'somewhat carefully consulted.' In addition to these it will be instructive to refer to *Barton* v. *Keys*, 1 Flip., 61; *Levi* v. *Insurance Co.*, 1 Fed. Rep., 206; *Walker* v. *Flint*, 7 Fed. Rep., 437; *Erwin* v. *Lowry*, 7 How., 172; *Gris-*

wold v. *Railroad Co.*, 9 Fed. Rep., 797; *Covell* v. *Heyman*, 111 U. S., 176, 4 Sup. Ct. Rep., 355; *Heidritter* v. *Oil-Cloth Co.*, 112 U. S., 294, 5 Sup. Ct. Rep., 135."

In *Compton* v. *Jesup*, 68 Fed., 263, Circuit Court of Appeals of the Sixth Circuit, Taft, Lurton and Ricks, Judges: Judge Taft, in disposing of the objection to the Federal Court's taking possession of property under a foreclosure suit where there was a suit pending in the State Court to establish a lien, said (283):

> "It is further objected that the court below had no power to take possession of the railroad property by its receivers in 1884, pending the suit of Compton, in the common pleas court, to subject the property to the payment of his liens. The argument is that Compton's suit was in the nature of a proceeding *in rem*, which impounded the property, and excluded any other court from assuming actual possession of it. *Heidritter* v. *Oil-Cloth Co.*, 112 U. S., 294, 5 Sup. Ct., 135, is cited in support of this proposition.—That was an ejectment suit. The plaintiff claimed under a sheriff's deed executed to a purchaser at a judicial sale by order of a state court, in a proceeding to enforce a mechanic's lien against the premises in controversy. The defendant claimed under a marshal's deed executed to the purchaser at a judicial sale by order of a federal court, in a proceeding, under the internal revenue laws, to forfeit the premises because used for illegal distilling. When claims for the mechanics' liens were filed, and suits were brought to enforce the same, in accordance with the New Jersey statute, the premises were in the actual custody of the United States marshal, who had taken possession under process of attachment issued on an information to enforce a forfeiture, which resulted subsequently in a sale, and the deed under which defendant claimed. The sale under the proceedings in the state court took place a few days after that by the United States marshal. It was held that proceedings begun in the state court in the nature of proceedings *in rem* to subject the premises to sale were ineffectual to confer any legal

title on a purchaser, if at the time they were begun the property was in the actual custody of the federal court for the purpose of a judicial sale by the latter court. It was not decided, however, that the proceedings in the state court might not be valid to establish the lien. The holding was expressly limited to the point that a deed under the state proceeding vested no legal title, as against the title conferred by the court first having actual custody of the property. It was the actual custody of the premises in the federal court which excluded the right of another court to entertain jurisdiction of the proceeding to subject the property thus removed from its control and disposition to a sale for the purpose of vesting a title superior to that which might be conferred by the federal court. Mere constructive possession would not have been enough to exclude possession by another court. In a conflict of jurisdictions, it is manifest that there can be no constructive possession by one court, where it cannot take actual possession, but it by no means follows that the constructive possession of one court will exclude the actual taking possession by another. *For this reason, even if the proceeding in the Lucas common pleas to establish Compton's lien was a proceeding in rem, it did not involve the actual seizure of the property pending the suit, and did not, therefore, prevent the federal court from taking actual possession of the property, through its receivers, in a proceeding to foreclose mortgages and other liens than Compton's.* This objection to the jurisdiction of the court below over the Knox and Jesup bill cannot, therefore, be sustained." (Italics ours.)

So in the case at bar, the appellants' proceeding in the State Court does not involve the seizure of the *res* pending the suit.

The recent case of *Roger* v. *J. B. Levert Co.*, 237 Fed., 737 (advance sheets of the Federal Reporter for February 15, 1917), illustrates the point for which we are contending. In that case respondents held a mortgage on the property of the bankrupts. Foreclosure proceed-

ings were brought and the property ordered sold under executory process. Thereafter the bankrupt brought a suit for the purpose of annulling and setting aside the foreclosure. The respondent answered under the Louisiana law setting up a counterclaim that in the event the foreclosure should be annulled, then the respondents should be given judgment for the amount of the mortgage indebtedness, with full recognition of their mortgage rights. The State Court adjudged the foreclosure sale illegal and ordered that the respondents have judgment against the bankrupt for the original mortgage indebtedness, and that the property be seized and sold at auction to settle the mortgage. Immediately thereafter the bankrupt filed his petition in bankruptcy and trustees were appointed. The original suit was begun two years before the bankruptcy. The United States District Court on the ground of comity turned the property back to the State Court. In reversing this the Court of Appeals said (page 742):

> "The action pending in the state court between the Levert Company and the Moore Planting Company, at the time the latter filed its petition in bankruptcy, was a personal action, although mortgage rights were involved. See article 12, La. Code of Prac.; *Rogers* v. *Binyon*, 124 La., 95, 49 South., 991; also *Ker* v. *Evershed*, 41 La. Ann., 15, 6 South., 566. Such action could only have a semblance to a real action after an issuance of a writ of *fieri facias* and the seizure of the property on which the lien was claimed, and no writ of *fieri facias* had been issued, and of course, no seizure thereunder. And it may be noticed that in the state of the litigation between the parties no writ of *fieri facias* could be taken out except at the pleasure and convenience of the Levert Company at any indefinite time within ten years after the rendition of the judgment.
>
> At the time the Moore Company filed its petition in bankruptcy, said company was in full, undis-

turbed possession of all the plantations and property scheduled as assets in the bankruptcy; and, when the receivers were appointed, they took possession of all the property for the bankruptcy court, and they were in possession and control at the time the order complained of was entered.

The application of the Levert Company to the bankruptcy court for the appointment of one of their number as a co-receiver is a judicial admission of these facts, and it cannot be said that the bankruptcy court has seized and taken possession of property at the time in the possession and custody of the state court.

It seems, therefore, clear that, if we should concede that comity should prevail between the bankruptcy court and the state court, the case presented does not show a proper and necessary case for the exercise of the same."

The situation presented in this claimed conflict of jurisdiction between the State and Federal Courts is not simply one of theory, but must be judged with reference to what should be done to protect the *res* for the benefit of all interested parties and finally end litigation and permit a reorganization. It is true that the proceedings brought by the appellants in the State Court may be *in rem*, but these proceedings do not require any seizure of the *res,* nor have the appellants even suggested such a seizure. While this state proceeding has been permitted to rest in the State Court actual possession of the *res* was taken by Webster as trustee in bankruptcy, and subsequently by Webster as receiver in the foreclosure suit. The proceedings in the foreclosure suit are not identical with the proceedings in the State Court. Where there is no one in actual possession of the property in the State Court, no one capable under the issues there involved to maintain and operate the property, and where the conflicting rights arising in bankruptcy cannot be determined in the State Court and the appellees cannot

be compelled *in invitum* to prosecute their foreclosure action there, the Federal Court is not required to give up its peaceful possession and control of the *res*.

III.

We will discuss briefly the authorities cited by the appellants.

In *Palmer* v. *State of Texas*, 212 U. S., 118, the receiver had been actually appointed and qualified in the State Court, and his jurisdiction established. The two suits, are alike in purpose, each being in effect to dissolve the company and wind up its affairs. Such identity does not exist in the case at bar.

In *Farmers' Loan and Trust Co.* v. *Lake Street Elevated Railway Company*, 177 U. S., 51, a suit was started in the State Court to foreclose a mortgage. A bill was subsequently filed in the Federal Court to enjoin the foreclosure. As in the Palmer case, *supra*, the effect of the two suits was the same; one being to foreclose and the other to prevent foreclosure. Both involved the same matter. The distinction between this case and the case at bar is therefore plain.

Heidritter v. *Oil-Cloth Co.*, 112 U. S., 294. An ejectment suit. Plaintiff claimed under a sheriff's deed executed by order of a State Court in a mechanic's lien suit. Defendant claimed under a marshal's deed in a Federal proceeding for forfeiture for illegal use of the premises for distilling. When mechanic's lien suit was started property was in actual possession of marshal. It was the *actual custody* of the marshal which excluded the right of the State Court to subject the property which had been removed from its control to a sale for the pur-

pose of vesting a title superior to that which might be conferred by the Federal Court.

Byers v. *McAuley*, 149 U. S., 608. This was an attempt on a bill in equity filed in the Circuit Court of the United States, to declare a will and the probate thereof void and of no effect, and to enjoin the administrator from disposing of the real estate. It appeared that the administrator appointed by the State Court had possession of decedent's property. The court held that the State Court had exclusive jurisdiction in the administration of estates of deceased persons and that the Federal Court had no jurisdiction over such proceedings. This was a case of actual possession and exclusive jurisdiction.

In *Metcalf* v. *Barker*, 187 U. S., 165, a judgment creditor sought to enforce a lien long prior to the bankruptcy of the defendant, and it was held that the Bankruptcy Court could not enjoin the enforcement of such lien. In the case at bar the appellees are not attempting to enjoin the prosecution of the suit in the State Court.

The effect of *Pickens* v. *Roy*, 187 U. S., 177, is the same as in *Metcalf* v. *Barker, supra*. Also *Peck* v. *Jenness*, 7 How., 612, and *Eyster* v. *Gaff*, 91 U. S., 521, to the same effect. In each case the possession of the *res* was first secured by the State Court.

Bardes v. *Hawarden Bank*, 178 U. S., 524, simply held a bankruptcy court had no jurisdiction to set aside fraudulent transfers made by the bankrupt before the institution of the proceedings in bankruptcy.

In *Frazier* v. *Southern Loan and Trust Company*, 99 Fed., 707, a receiver had actually been appointed in the State Courts and the two actions were identical.

Mound City Company v. *Castleman et al.*, 187 Fed., 921, is another case of identical actions and *res adjudicata*.

It is to be noted that in practically all of the cases cited by the appellants the question is between the right of a bankruptcy court subsequently acquiring possession of the *res* to prevent proceedings in a State Court. In our case we have a foreclosure proceeding involving entirely different issues from the proceeding in the State Court, and no attempt is made by the appellees to prevent prosecution of the appellants' action in the State Court.

IV.

CONCLUSION.

The rule permitting a State Court having once required jurisdiction of the parties, to continue the particular suit to its determination is one of comity merely. It should not be enforced to the manifest injury of the *res* and of all the parties interested therein. The *res* in this particular case is not simply so much real estate, but an active, going concern. There are numerous questions of conflicting liens and rights; there is income from property belonging to the trustee in bankruptcy; there is income from property belonging to the appellees as mortgage creditors; there are pledged and unpledged purchase money mortgages; there are outstanding contracts for the sale of land and for the supply of water to innocent third persons. The Irrigation Company is admittedly insolvent. Expenditures are immediately and continuously necessary to maintain the property, to carry out the obligations of the Irrigation Company, and to protect the security. The effect of the litigation in the State Court was simply to tie the hands of the Irrigation Company and to force its bankruptcy. The effect of the bankruptcy was simply to stay the action of unsecured creditors and in no respect permitted the operation and maintenance of the *res*. It was only by the appoint-

ment of a receiver in the foreclosure suit that money could be raised to deliver water to the settlers and to protect the orchards of the Irrigation Company. It is indeed a most unusual thing that a Federal Court has permitted property in the hands of its trustee in bankruptcy to be turned over to a receiver in a foreclosure suit, but the Federal Judge, recognizing the exigencies of the situation, that the property must be operated, that the trustee in bankruptcy had no funds and no credit and could not operate the property, permitted the institution of the foreclosure proceedings in the Federal Court and appointed as receiver the trustee in bankruptcy, and thereby effected the operation and maintenance of the property through the season of 1916 by one authority for all interests.

As opposed to this constructive action of the Federal Judge, we have the action of the appellants. A suit, begun in the State Courts in June, 1915, a suit not yet brought to issue, no motion for receiver made, no certainty that one will ever be made; no plan of operation and maintenance even suggested or possible under the issues. The suit in the State Court is destructive of the *res* as a going irrigation system.

If the Federal Court in this case is to be deprived of its jurisdiction over the *res* merely because of the prior institution of a suit in the State Court, there is no possibility of an adjustment of the many conflicting claims—those of the appellants, the mortgage creditors, other lien holders, and contract creditors—there is no possibility of a division of the income of the Irrigation Company as a going concern between the mortgagees and the trustee in bankruptcy; there is no possibility of the continued operation and maintenance of the company. If the prayer of the appellants' answer is granted and control of the *res* taken away from the Federal Court, what

is to become of the property of the Irrigation Company and the settlers in the Valley dependent upon the continuous operation of its property for the very existence of their farms? The appellants have asked for no receiver. They may never ask for a receiver, or the court may never grant them a receiver. The Irrigation Company is bankrupt, the trustee in bankruptcy is without credit to finance the operation and maintenance of the property. It is only through one receivership and in one court that this property can be maintained, that its orchards can be cultivated and its settlers can receive water, and that a final reorganization can take place. We submit that it would be most unfortunate if this court should order the District Court to turn over the *res* from its receiver and from its trustee in bankruptcy now in peaceful, single possession, to the complete control of the State Court, and tnat it would be disastrous to the rights of every one interested in the property—the appellants, the appellees, the contract creditors, the stockholders of the Irrigation Company, and the settlers,—if this court should so fetter the Federal Court by refusing to permit the Federal Court to have any disposition of the *res,* with the result that the Federal Court should be unable to operate and maintain an irrigation system supplying thousands of farms over sixty miles of valley. And surely if the Federal Court cannot control the *res,* its receiver and its trustee in bankruptcy will be without credit to finance the operation of the irrigation system.

Respectfully submitted,

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